

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

United States of America,)	
Plaintiff,)	
)	
v.)	
)	Case No. 02-0114-01-CR-W-NKL
James R. Nichols, Robert Gomez,)	
Gwendolyn Baker and Corrine Conway,)	
)	
Defendants.)	

ORDER

Before the Court is Defendant James Nichols' Application for Certificate of Appealability under 28 U.S.C. § 2253(c)(2) [Doc. # 412].

On December 4, 2009, the Court issued an order addressing Nichols' Petition for Writ of Error *Coram Nobis* and/or *Audita Querela*. In the Order, the Court found that *coram nobis* relief was unavailable, but construed Nichols' request for *coram nobis* relief as a motion for relief from sentence under 28 U.S.C. § 2255. Because Nichols' motion was filed over three years after his conviction was affirmed on appeal, the Court found that any § 2255 motion for habeas corpus relief was time-barred. While the Court went on to consider the merits of Nichols' claims on his request for relief under *audita querela*, the Court did not reach the merits of Nichols' motion with regard to § 2255.

Where district courts deny habeas corpus relief on procedural grounds, a defendant moving for a certificate of appealability must make a "substantial showing" that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a

constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” 28 U.S.C. § 2253; *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The Eighth Circuit has clarified:

1) if the claim is clearly procedurally defaulted, the certificate should not be issued; 2) even if the procedural default is not clear, if there is no merit to the substantive constitutional claims, the certificate should not be issued; but, 3) if the procedural default is not clear and the substantive constitutional claims are debatable among jurists of reason, the certificate should be granted.

Langley v. Norris, 465 F.3d 861, 863 (8th Cir. 2006) (citation omitted). Nichols has failed to make a “substantial showing” that jurists of reason would find it debatable whether his claim was procedurally defaulted; even if he could have shown otherwise, under the facts of this case, no reasonable jurist would find Nichols’ substantive § 2255 claims debatable. *See generally* [Doc. # 410, Order on Nichols’ Petition for Writ of Error ... (discussing merits of Nichols’ arguments with respect to his petition for relief under *audita querela*)]¹; *Pamperin v. United States*, Nos. C 07-3077-MWB, CR 03-3069-MWB, 2009 WL 3010539, at *10-13 (N.D. Iowa Sept. 16, 2009) (discussing applicability of *United States v. Santos*, 128 S. Ct. 1994 (2008) to § 2255 petitions).

¹ Nichols’ appears to raise a new argument – one not discussed in his underlying Petition for Writ of Error – in his Application for Certificate of Appealability: an argument that there was no evidence that the funds at issue were “profits” from money laundering. This argument is not properly raised in an application for a certificate of appealability and the Court does not consider it.

Therefore, Nichols' Application for Certificate of Appealability of a § 2255 motion
[Doc. # 412] is DENIED.

s/ Nanette K. Laughrey
NANETTE K. LAUGHREY
United States District Judge

Dated: February 16, 2010
Jefferson City, Missouri